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No. 92-55

In The

Supreme Court of the United States

October Term, 1992

FEDERAL PACIFIC ELECTRIC COMPANY, a Delaware Corporation,

Petitioner,

vs.

CLARK NEWTON and JOYCE NEWTON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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FEDERAL PACIFIC ELECTRIC COMPANY, a Delaware Corporation,

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vs.

CLARK NEWTON and JOYCE NEWTON,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Clark Newton and Joyce Newton submit the following brief in opposition to Federal Pacific Electric Company's petition for review under writ of certiorari.

STATEMENT OF THE CASE

The following additional facts are material to consideration of the questions presented.

Federal Pacific Electric Company ("Federal Pacific") omits the explanation for the procedure through which Juror Nancy Ketcham was substituted for Juror Cynthia Johnson. Federal Pacific's omission is of particular importance because this procedure was arranged by the court in response to complaints by respondents' counsel that Juror Johnson slept throughout the trial.

Standing alone, the transcript excerpt of the bench conference quoted by Federal Pacific at page 4 is not sufficiently revealing. Placed in context and supplemented by Court Exhibit No. 1, however, the purpose of the procedure becomes clearer.

During the course of trial, respondents complained that one of the jurors was sleeping during the trial. The court reserved ruling on the complaint. The court, in chambers, made arrangement with the parties to suggest the name of a juror to be designated as alternate prior to submitting the case for consideration. The sole purpose for arranging this procedure was to allow the court and counsel to observe the jury. Federal Pacific did not object to the procedure. *See generally,* Appendix A, 1a-2a, *infra*.

Immediately prior to submission of the case, as previously agreed by the parties, the court conducted the bench conference to select an alternate juror. Although the procedure utilized written submissions, it was conducted in the presence of attorneys for *both* the Newtons and Federal Pacific.[1] Federal Pacific participated

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1. During the oral arguments presented in the appeal of this matter, counsel (Cont'd)

in the process without inquiry or objection.

Respondents again lodged their complaint against Juror Johnson by submitting the following request *in the presence of Federal Pacific's counsel:*

> Judge West,
>
> The Plaintiff would ask that Juror Cynthia Johnston [*sic*], who slept through most of the trial, be excused.
>
> Mike Noland

In response, the trial judge, *in the presence of Federal Pacific's counsel,* indicated his finding in writing:

> *I agree.* LRW.

This written finding was made a part of the record as court Exhibit No. 1. *See* Appendix B, 3a.[2] The trial judge then stated, *again*

(Cont'd)
for Federal Pacific admitted to the court that the exchange of names, although written, was conducted in his presence. If he could not see the names, or did not understand the procedure, he merely needed to inquire. In this regard, Federal Pacific's assertion that the procedure was somehow "*ex parte*" is patently frivolous.

2. At oral arguments on appeal, the court inquired of Federal Pacific's counsel why this written acknowledgment by the trial judge that Cynthia Johnson had been sleeping does not constitute a "finding". Federal Pacific's counsel had no response.

In its petition for rehearing, Federal Pacific again urged that the replacement procedure was conducted "*ex parte*" and that the trial judge never made a (Cont'd)

in the presence of Federal Pacific's counsel, that he would excuse her.

The court substituted Juror Ketcham and the jury retired to deliberate. Federal Pacific made no objection, either during the substitution conference or at any time thereafter. Not even during the deliberations nor during the verdict's return did Federal Pacific object to Juror Johnson's removal. Federal Pacific sat idly by. The allegation of error was first invented by Federal Pacific during post-trial motions.

SUMMARY OF THE ARGUMENT

Federal Pacific asserts that the procedure implemented by the trial court effectively granted the respondents an additional peremptory challenge. While this argument might have some merit had the court merely chosen one party's suggestion over the other's, the record shows clearly that Juror Johnson was dismissed for cause. The fact that a party initiated the complaint which led to the juror's dismissal for cause does not convert the suggestion to a peremptory challenge.

(Cont'd)

"finding". Federal Pacific suggested that the Court of Appeals had overlooked these arguments (essentially the same arguments presented herein). In light of the admissions made by Federal Pacific's counsel at oral argument, the Newtons viewed the petition as frivolous and sought sanctions. Although the court stopped short of imposing sanctions, the court's response was not surprising:

> Although the court believes the issue raised in the petition for rehearing was fatuous, and thus ignored rather than overlooked it in the first instance, we do not conclude it was of the nature to prompt sanctions.

App. at 6a.

Federal Pacific's other argument centers around its continued insistence that the court failed to make a finding that Juror Johnson was sleeping and that Federal Pacific was somehow left out of the procedure which led to her replacement. The record at the district court level, coupled with admissions by Federal Pacific's counsel at oral argument, puts this contention to rest.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT DID NOT GRANT RESPONDENTS AN ADDITIONAL PEREMPTORY CHALLENGE; THE COURT DISMISSED JUROR JOHNSON FOR CAUSE.

The Court of Appeals recognized that the standard to be applied in reviewing a trial court's decision to remove a juror who becomes unable to perform her duties and substitute an alternate juror is abuse of discretion. *McCormack v. Noble Drilling Corp.*, 608 F.2d 169, 175 (5th Cir. 1979); *See also, United States v. Cameron*, 464 F.2d 333, 335 (3rd Cir. 1972) (dealing with Fed. R. Crim. P. 24(c), counterpart to Fed. R. Civ. P. 47(b)); *United States v. Ashby*, 864 F.2d 690, 694 (10th Cir. 1988) (trial court has "considerable discretion" in deciding whether jurors are able to perform their duties without prejudice or bias).

During the course of proceedings the Newtons' counsel called the trial judge's attention to the fact that juror Cynthia Johnson had been sleeping during trial. Parties have a duty to advise the court of such conduct. *United States v. Carter*, 433 F.2d 874, 876 (10th Cir. 1970); *United States v. Peters*, 713 F. Supp. 1246, 1252 (C.D. Ill. 1989). Upon receiving the complaint, the trial judge advised the parties that he would observe the juror and asked

the parties to do the same.[3]

Although the Newtons lodged the complaint concerning Juror Johnson's conduct, *the trial judge himself* ultimately determined that Johnson indeed had been sleeping. The trial judge's prior attempt to solicit input from counsel on whether to replace Johnson does not alter the result. Johnson's removal did not result from the exercise of a peremptory challenge.

Guided by the decisions which have dealt with the issue, there can be little doubt that a juror who sleeps throughout the trial is unable to adequately perform his or her duties and that a court's dismissal of that juror is properly within its discretion. *See, e.g., United States v. Warner,* 690 F.2d 545, 555 (6th Cir. 1982); *United States v. Smith,* 550 F.2d 277, 285 (5th Cir. 1977); *United States v. Cameron,* 464 F.2d 333, 335 (3rd Cir. 1972). The dismissal was consistent with the well-established rule among the circuits.

II.

THE TRIAL COURT PROPERLY TOOK NOTICE OF JUROR JOHNSON'S CONDUCT AND MADE THE APPROPRIATE FINDING.

The court gave the parties an opportunity to make a final recommendation concerning the sleeping juror. The courtesy, however, was not required. *United States v. Carter,* 433 F.2d 874, 876 (10th Cir. 1970) (conduct of a juror in open court is a matter of which the trial court may take judicial notice); *United States*

---

3. Federal Pacific suggests that the substitution procedure effectively granted the respondents an additional peremptory challenge. Of course, the jury had already been selected, including the alternate. The proceedings Federal Pacific now challenges had nothing to do with *picking* the jury in the first instance. Rather, the process addressed the *substitution* of a juror for cause.

v. Fajardo, 787 F.2d 1523, 1526 (11th Cir. 1986) (trial judge does not need counsel's consent to replace a juror with an alternate; only a reasonable cause for the replacement).

Federal Pacific asserts that Fed. R. Evid. 201 limits a court's power to take notice of the conduct of jurors during proceedings. Yet Federal Pacific neither cites any decisional authority supporting its position nor explains how the plain language of that rule imposes such proscription. Certainly, the Tenth Circuit's decision in *Carter* holds otherwise.

Interestingly, Rule 201 does permit Federal Pacific an opportunity to be heard as to the propriety of taking judicial notice, even *after* notice has been taken. This notwithstanding, Federal Pacific lodged no objection to the procedure, even after Juror Johnson was dismissed. *See United States v. Warner*, 690 F.2d 545, 555 (6th Cir. 1982) (placing significance on counsel's failure to object to the procedure which resulted in dismissing a sleeping juror). Only after an adverse verdict, did Federal Pacific cry foul.

Federal Pacific relies heavily on *United States v. Barrett*, 703 F.2d 1076, 1083 (9th Cir. 1983), for the proposition that a court must conduct a formal hearing into allegations of juror misconduct. Federal Pacific reads too much into *Barrett* (a case first cited on appeal by the Newtons, not Federal Pacific).

The *Barrett* court reversed the judgment because the trial court refused to adequately investigate and replace a juror who, admittedly, had been sleeping. Here, however, the trial judge acted on the complaint and ultimately removed the juror. The Tenth Circuit's affirmance in this case does not conflict with *Barrett*.

The Tenth Circuit ruling below is consistent with the criteria established in virtually every circuit which has considered the

question: Absent a complete lack of factual basis for the substitution, the decision will not be disturbed.

III.

THE PROCEDURE OF WHICH FEDERAL PACIFIC COMPLAINS DID NOT RESULT IN PREJUDICE TO FEDERAL PACIFIC.

Although Federal Pacific does not argue expressly that the juror replacement procedure was prejudicial, that position is implied at page 5 where the juror's educational background is summarized. To the extent that Federal Pacific intimates Juror Johnson's presence would have altered the result, the contention provides no legal basis for relief.

The Tenth Circuit's affirmance followed the established rule that "an interested party to a lawsuit has no vested right in any particular juror." *Metropolitan Paving Co. v. Int'l Union of Operating Eng'rs*, 439 F.2d 300, 304-05 (10th Cir. 1971) (*citing United States v. Chapman*, 158 F.2d 417 (10th Cir. 1947)). A party's right is limited to challenging *unqualified* jurors.

Juror Johnson had slept through the proceedings. She had yet to deliberate with the other jurors. Federal Pacific's assumption that any inclination Johnson might carry into the jury room would not only survive the deliberations intact, but persuade all the other jurors as well, is nothing more than pure speculation. Such speculation is insufficient to warrant corrective relief. *United States v. Rodriguez*, 473 F.2d 330, 332-33 (1978).

Moreover, any prejudice argument would be misplaced. The type of prejudice from juror replacement which warrants reversal should arise out of the substitution procedure itself and should focus on the effect the *procedure* had on the remaining jurors.

The record is devoid of any showing that the remaining jurors suffered any bias or prejudice as a result of the manner in which Johnson was replaced. The trial court accomplished the substitution without attention to the circumstances or embarrassment to any juror. The substitution was completed prior to the beginning of any deliberations. The procedure was harmless.

CONCLUSION

A juror who sleeps through the proceedings cannot be expected to perform her duties. The Tenth Circuit, consistent with the criteria applied in virtually every circuit, properly recognized that the trial judge had not abused his discretion in replacing Juror Johnson for cause.

For the foregoing reasons, Federal Pacific's petition for writ of certiorari should be denied.

Dated: August 5, 1992.

Respectfully submitted,

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APPENDIX A — EXCERPT FROM TRIAL COURT ORDER FILED MARCH 25, 1991 (DOC. NO. 148)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-89-1054-W

CLARK NEWTON and JOYCE NEWTON,

Plaintiffs,

vs.

ENERTECH, INC., an Illinois corporation; and FEDERAL PACIFIC ELECTRIC COMPANY, a Delaware corporation,

Defendants,

ORDER

* * *

[p. 3]: In chambers, the Court recalls arranging with the parties to submit a name of a juror to be selected as the alternate in the trial. No objection was made by either side.

This procedure was arranged because Plaintiff's counsel complained that the juror Cynthia Johnson was sleeping during trial. The Court reserved ruling on that matter and arranged the procedure in order to allow both sides to observe the jury, contemplating the possibility that the parties would agree that Cynthia Johnson was inattentive or sleeping. Returning to trial, the Court recalls observing that Cynthia Johnson was inattentive and sleeping during trial. Therefore, upon receiving Plaintiff's

slip which indicated a desire to designate Cynthia Johnson as the alternate because she had been sleeping, the Court agreed and indicated its finding by writing "I agree" on Plaintiff's slip and initialing thereunder. *See* Court file, docket number 134. Accordingly, the Court finds no prejudice to the Defendant FPE or weakening of the jury system by eliminating an inattentive and sleeping juror.

APPENDIX B — EXCERPT FROM COURT'S EXHIBIT NO. 1 FILED JANUARY 18, 1991 (DOC. NO. 134)

(Omitted Here But Submitted Separately As "Lodging Appendix")

APPENDIX C — TENTH CIRCUIT ORDER FILED MAY 19, 1992

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 91-6174

91-6276

CLARK NEWTON and JOYCE NEWTON,
Plaintiffs-Appellees,

v.

ENERTECH, INC., an Illinois corporation; CHALLENGER ELECTRICAL EQUIPMENT CORP., also known as FPE, a Delaware corporation Pacific Electric Company; RELIANCE ELECTRIC INDUSTRIAL COMPANY AND/OR RELIANCE ELECTRIC COMPANY, a Delaware corporation & holding corporation for Federal Pacific Electric Company, a Delaware corporation,

Defendants.

and

FEDERAL PACIFIC ELECTRIC COMPANY, a Delaware corporation,

Defendant-Appellant.

COMMERCIAL UNION INSURANCE COMPANY,
Intervenor.

ORDER
Filed May 19, 1992

Appendix C

Before MOORE and BRORBY, Circuit Judges.

Although the court believes the issue raised in the petition for rehearing was fatuous, and thus ignored rather than overlooked it in the first instance, we do not conclude it was of the nature to prompt sanctions. Accordingly, the motion for sanctions is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

s/ Patrick Fisher
By: PATRICK FISHER
Chief Deputy Clerk